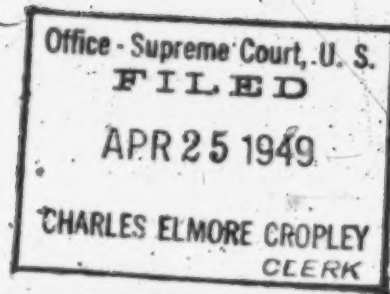


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SUPREME COURT, U. S.



**IN THE SUPREME COURT OF THE
UNITED STATES**

No. 40

OKLAHOMA TAX COMMISSION,
Petitioner,

VERSUS

THE TEXAS COMPANY,
Respondent.

**REQUEST FOR LEAVE TO FILE A RESPONSE TO
PETITION FOR REHEARING
and
RESPONSE TO PETITION FOR REHEARING**

R. F. BARRY,
Oklahoma City, Oklahoma,
Attorney for Petitioner.

APRIL, 1949.

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**REQUEST FOR LEAVE TO FILE A RESPONSE TO
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The petitioner, Oklahoma Tax Commission, respectfully requests leave of this Honorable Court to file a response herein to the petition for rehearing tendered by the respondent, The Texas Company.

RESPONSE TO PETITION FOR REHEARING

This case arose through the Oklahoma Tax Commission assessing gross production and proration taxes against the respondent for September and October, 1942. The respondent caused the taxes assessed to be paid under protest and instituted an action in the District Court of Oklahoma County, Oklahoma, to recover the taxes. From an adverse judgment of the District Court, the respondent perfected an appeal to the Supreme Court of Oklahoma. The Supreme Court reversed the judgment of the District Court and from the Supreme Court's action a writ of *certiorari* was allowed in this Court and on March 7, 1949, the decision of the Supreme Court was reversed.

The Texas Company, respondent in No. 40, has caused to be filed herein a motion wherein it seeks leave of this Court to file a petition for rehearing out of time. The motion was accompanied by a petition for rehearing.

In substance, the relief sought in the above referred to petition for rehearing is that the operation of the opinion rendered herein be made wholly prospective; this for the asserted reason that the decision reached in the instant case could only be reached by overruling a number of other opinions handed down by this Court and upon which opinions the respondent had relied. In answer to the contention so made, the petitioner asserts that (a) *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, handed down March 7, 1938, furnished an adequate basis for the decision reached in the instant case, and (b) under the facts in the

instant case no injustice or hardship will be brought about by permitting the opinion to operate retroactively.

Our argument and authorities in support of the foregoing contentions will be presented under two general propositions.

PROPOSITION NO. 1

The case of *Helvering v. Mountain Producers Corporation* furnished an adequate basis for the decision in the instant case.

The effect of respondent's contention is that the decision reached herein could not have been reached without overruling *Choctaw, O. & G. R. Co. v. Harrison*, 235 U.S. 292, and some four other cases based thereon. We respectfully submit that the language of the opinion rendered herein clearly refutes the aforesaid contention. The right to impose the gross production tax here assessed finds adequate basis on two distinct grounds: (1) The tax does not directly burden and hinder a federal instrumentality; (2) The tax is a nondiscriminatory property tax. The other tax here imposed, an excise tax of one mill on each barrel of oil produced, was considered to be an excise tax and the assessment thereof was sustained wholly on the basis that it did not directly burden respondent as a federal instrumentality. Our assertion that the *Mountain Producers* case furnished an adequate basis for the present decision is amply sustained by the following quotation therefrom:

"Respondents strongly urge that the *Mountain Producers* decision is not controlling or effective to require

reversal in these cases, since it involved a tax ~~on~~ net income rather than gross production and excise taxes. And they insist that a sharp line should be drawn between what they call lessees performing a governmental function and independent contractors doing work for the Government. The latter distinction is largely, if not altogether verbal, in the context of the fact situations in these cases. As for the former difference, although the Court explicitly overruled only the *Gillespie* and *Coronado* cases, the groundings of the *Mountain Producers* decision do not permit limiting its effects to so narrow an application.

"The language last quoted above is as applicable to the present cases as it was to the *Gillespie* and *Coronado* decisions. The taxes here are nondiscriminatory. The respondents are 'private persons' who seek immunity for their property or gains because they are engaged in operations under a government contract or lease. The functions they perform in operating the leases are hardly more governmental in character than those performed by lessees of school lands or, indeed, by many contractors with the Government. The lessees in the *Mountain Producers* case stood identically with the respondents in all these respects.

"Moreover the burdens of the taxes here, if any of a character likely to interfere with respondents in carrying out the terms of their leases, are as appropriately to be judged by 'regard * * * to substance and direct effects,' and as inappropriately to be determined 'by merely theoretical conceptions of interference with the functions of government,' as were those in the *Mountain Producers* case. * * *

Further on in the opinion, the *Mountain Producers* decision is again declared to be controlling in the following quoted language:

"The *Mountain Producers* case was not decided on narrow, merely technical or presumptive grounds. Its very foundation was a repudiation of those insubstantial bases for securing broad private tax exemptions, unjustified by actual interfering or destructive effects

upon the performance of obligations to or work for the government, state or national. The decision came as the result of experience and of observation of the constant widening of the exempting process from tax to tax to tax.

"(7) Since that decision, as we have noted, the process has been reversed in direction. True intergovernmental immunity remains for the most part. But, so far as concerns private persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain exemption. In the light of the broad groundings of the *Mountain Producers* decision and of later decisions, we cannot say that the *Gypsy Oil*, *Large Oil* and *Barnsdall Refineries* decisions remain immune to the effects of the *Mountain Producers* decision and others which have followed it. They are out of harmony with correct principle, as were the *Gillespie* and *Coronado* decisions and, accordingly, they should be, and they now are, overruled. This accords with the result reached in *Santa Rita Oil & Gas Co. v. State Board of Equalization*, 112 Mont. 359, 116 Pac. (2d) 1012, 136 A.L.R. 757. * * *

In the decision in the instant case, the Court stated that "the high-water mark of immunity for non-Indian lessees of restricted and allotted Indian lands came in 1922 when the *Gillespie* decision" was handed down, and that *Group No. 1 Oil Corp. v. Bass*, 283 U.S. 279, "may be taken to mark a turning point in expansion of the lessee's immunity." This Court then proceeds to refer to a number of other cases: *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, for example, as having established tax liability on the part of governmental agencies prior to the handing down of the *Mountain Producers* case. In brief, as we read the opinion

the decision in the *Mountain Producers* case did not necessarily declare new law, and since such is true, the decision in the instant case definitely did not declare new law on the proposition that a federal instrumentality was not exempt from nondiscriminatory state taxes that did not substantially burden. In this particular the Tenth Circuit Court of Appeals in *Sunray Oil Co. v. Commissioner of Internal Revenue*, 147 Fed. (2d) 962, 964, certiorari denied, 325 U.S. 861, had this to say at the page indicated:

“* * * Indeed, the decision in *Helvering v. Mountain Producers Corporation*, *supra*, was given retrospective operation in a situation not substantially different from the one here presented. Moreover, the decisions in the *Coronado* and *Gillespie* cases had been so limited by subsequent decisions of the Supreme Court, it may be doubted that even prior to the decision in *Helvering v. Mountain Producers Corporation*, *supra*, income from leases of the character here involved would have been held to be immune from federal taxation. See dissenting opinion, *Mountain Producers Corporation v. Commissioner of Internal Revenue*, 10 Cir., 92 Fed. (2d) 78, 81.”

In the above cited case, the Sunray Oil Co. was unsuccessful in prevailing upon the Circuit Court to adjudge that the decision in the *Mountain Producers* case should be given prospective application; this for the reason the oil company had been assessed income taxes on income accruing to it from oil and gas produced under leases covering lands owned by the State of Oklahoma prior to the date of the *Mountain Producers* decision. The oil company was denied such relief.

In the *Santa Rita Oil & Gas Co.* case cited in the foregoing quotation from the opinion in the instant case, the

Supreme Court of Montana held that the *Mountain Producers* case overruled the *Gilliespie* and *Coronado* cases, "and in so doing necessarily overruled the *Choctaw* and *Jay-bird* cases and many others like them." In the conclusion so reached, this Court now concurs as reflected by the foregoing quotations. We, therefore, say that the *Mountain Producers* case is the decision that determined that the respondents were liable for the taxes here assessed and not the decision herein rendered; that the *Mountain Producers* case is the decision that brought about a change in the law and not the present opinion; that the *Mountain Producers* case in effect overruled the cases that respondent relied upon here and that this Court in the instant case did nothing more than expressly overrule opinions because it was found that they were in direct opposition to the *Mountain Producers* case. The foregoing is here decisive for the reason that there is not here involved the assessment of any tax that accrued prior to March 7, 1938. In fact, as we will hereinafter show, respondent owes no tax accruing prior to September 1, 1942. It has either paid or obtained an acquittance of all taxes accruing prior to that date. We add, that when the present case arose, the *Santa Rita Oil Company* case had become final; that decision was handed down on September 12, 1941.

PROPOSITION NO. 2

No injustice nor hardship will be vested upon respondent by making the opinion herein retroactive.

As before stated, the respondent's liability for payment of the taxes here involved is limited to the taxes here assessed and those accruing after such assessment. The record reflects that the taxes assessed were paid under protest and placed in suspense and such is true of all taxes accruing subsequent to the date of the last assessment. It accordingly follows that the object and purpose of the relief now sought by respondent is to require the petitioner to refund taxes paid by virtue of the proceedings had in this case. The Record reflects that the petitioner assessed gross production and proration taxes against the respondent for the months of September and October, 1942. The taxes so assessed were paid under protest, notice was given of intention to file suit to recover the taxes so paid and an action for such purpose was instituted in the District Court of Oklahoma County. As by statute provided, the taxes so paid were by petitioner placed in suspense and are now so held. Sec. 1475, Title 68, O.S. 1941, furnishes the basis for the aforesaid proceedings. In the assessment so made, neither interest nor penalty was assessed for the reason none had accrued. While the Record does not so show, for each month subsequent to October 1942, respondent caused to be paid all taxes as they accrued under protest. The payments were placed in suspense and are now so held. The respondent has never paid any monies as either interest or penalty, nor does it contend that it has

done so. While the Record does not show the taxes accruing after October, 1942, had been paid, the provisions of Sec. 1475, *supra*, show that respondent could have done those things that we say it did.

The Record contains but little of the facts bearing upon the proposition of law presented under respondent's petition for rehearing; this for the reason that petitioner at no time anticipated that this law issue would be raised. It is for these reasons that we feel justified in going outside the Record in order to present in a general way the facts relating to the issue under discussion. We wish to point out that the respondent is fully advised of all of the facts herein referred to and has a copy of all written instruments herein referred to, except the opinion rendered by the Legal Division of the Oklahoma Tax Commission.

After the opinion in the *Mountain Producers* case had been handed down and on May 25, 1938, Mr. Cund, General Counsel for the Oklahoma Tax Commission, prepared a legal opinion in connection with the effect of that decision on the tax liability of lessees producing oil and gas from the restricted lands of Indians. The opinion was addressed to the attention of the Oklahoma Tax Commission and forms a part of the permanent records of that Commission. In speaking of the theory that existed prior to the *Mountain Producers* case and under which federal instrumentalities had been exempted from nondiscriminatory state taxes, the author of the opinion had this to say:

"This theory is exploded by the decision in the *Mountain Producers* case. It now appears that the

lessee's interest in the oil and gas produced from restricted Indian land is now and probably at all times since we have had a gross production tax has been subject to the payment of gross production tax. * * *

After the above referred to opinion had been promulgated, the petitioner prevailed upon the several lessees producing oil and gas under departmental leases to pay gross production and proration taxes. This is reflected by letters under date of September 29, 1939, and July 16, 1941, photostatic copies of which appear in the Appendix hereto. The matter of determining the tax liability of the numerous lessees entailed a great deal of work and it was not until 1941, that proposed assessments of taxes were made against the lessees. The proposed assessments were considered by the Oklahoma Tax Commission on June 10, 1942, on which date an agreement was reached by the terms of which a formal order was made and entered sustaining the proposed assessment of taxes from the date of the *Mountain Producers case*, March 7, 1938, to June 30, 1941. It seems that a gentlemen's agreement was reached at that time to the effect that the lessees would pay all taxes that accrued from the date of the assessment to the date of the hearing, June 10, 1942. As by applicable statute provided, the aforesaid order of the Oklahoma Tax Commission was formally approved by the District Court of Oklahoma County, in connection with the tax liability of respondent that accrued prior to June 30, 1941, there had accrued \$33,175.55 as gross production taxes and proration taxes in the amount of \$2.32. These figures do not include interest

or penalty that accrued. As a result of granting an acquittance of all taxes that accrued prior to March 7, 1938, the respondent was assessed and did pay as gross production taxes the sum of \$106.22 and as proration taxes the sum of \$.32, which amounts represented taxes accruing from March 7, 1938, to June 30, 1941. The Texas Company, as aforesaid, thereafter paid all taxes as they accrued up to the close of August 1942, which means that for the months of July and August, 1942, it voluntarily paid the tax.

The foregoing facts reflect that the parties hereto originally considered that the *Mountain Producers* case probably settled the matter of respondent's liability for gross production and proration taxes. The District Court of Oklahoma County so believed and accordingly found, which finding and decision was sustained by the opinion rendered herein. The foregoing facts further reflect that the Oklahoma Tax Commission was willing and did treat the *Mountain Producers* case as not being retroactive, and it is to be presumed that it did so because to otherwise treat the case would force the imposing of interest and penalties on the respondent and other lessees similarly situated. This situation does not obtain here for the reason that no interest and penalty was assessed and none has accrued.

The author at Page 534, Sec. 130 of 14 Am. Jur. states as a general rule of law that a decision of a court of supreme jurisdiction overruling a former decision, is retroactive in its operation. The author points out that the courts have long recognized an exception to the general rule, which ex-

ception is that vested property and contract rights will not be permitted to be destroyed by decisions declaring the law to be other than what it was declared to be when the property or contract rights came into being. The respondent does not come within this exception for the reason that none of its property or contract rights can be destroyed or impaired by making the decision in the instant case retroactive. In speaking of what constitutes a property right that will be protected upon prior opinions being overruled, the Supreme Court of Oklahoma in *Teague v. Smith*, 85 Okla. 12, 16, 204 Pac. 439, had this to say:

"A rule of property is an equitable rule under which honest investments have been made upon the assumption that a court of last resort has established their title, and should be invoked only to protect such investments. * * * It needs no citations of authorities to sustain the rule that no one can have a vested interest to inherit the lands of decedent. The Legislature may change the law of descent and distribution at will. The doctrine of *stare decisis* has no application in this cause."

The law is well settled that no one has a vested right in the matter of his property remaining free from taxes or that his property be taxed at the rate prevailing as of the date of acquisition or that the method or manner of collecting taxes remain static. 16 C.J.S., pp. 663, 664, Sec. 240.

There has gradually evolved another exception to the rule that the operation of a decision overruling prior decisions will not be given retroactive effect — where to do so would work unusual hardships on persons who had relied upon the opinion, or opinions, that were overruled. In speaking of the exception so recognized by some of the

courts, the author at Page 346 of 14 Am. Jur., observes that while there is high authority for the proposition that the only exception to the rule that a decision overruling prior decisions will be given retroactive operation is where either vested property rights or contract rights are involved, some courts "in cases of unusual hardships" have extended the exception. The respondent contends that the Supreme Court of Oklahoma has recognized and follows the last exception above referred to. Generally speaking, this is true, but the Supreme Court of Oklahoma has only applied the exception in those cases where extraordinary hardships would be visited upon parties by declaring the law to be other than what it had formerly been declared to be. The respondent relies upon the case of *Oklahoma County v. Queen City Lodge*, 195 Okla. 131, 156 Pac. (2d) 340. The facts in that case were in substance these: The taxing officials of Oklahoma County caused certain real estate owned by Queen City Lodge to be placed on the ad valorem tax rolls. The Lodge promptly filed an action in the District Court seeking to have the property stricken from the tax rolls for the reason that it was a benevolent institution and as such, its property was exempt from ad valorem taxes under the Constitution of the State of Oklahoma; that the Supreme Court of the State of Oklahoma had so held. In this contention, the District Court concurred and accordingly rendered judgment striking the property from the tax rolls. No taxes were paid. An appeal followed to the Supreme Court and there the decision of the District Court was reversed. The Supreme Court held in substance that

mere ownership of property in a benevolent institution did not spell exemption from taxes and that before the property would be exempt from taxes, it must be used by the institution for benevolent purposes. This decision was contrary to prior decisions and such contrary decisions were overruled. It is true that the court held that the *Queen City Lodge* decision should have prospective operation only, but the court so held because " * * * To require payment now with the heavy interest and penalties attached would work extraordinary hardship in a great number of cases, and in many cases would result in financial ruin." The above does not obtain in the instant case since no interest nor penalty has accrued on the taxes that respondent owes Oklahoma. All taxes have been paid and are now held in suspense by the petitioner, which statement is true of all other oil companies that the opinion herein will affect. And not only is there here no possibility of any interested taxpayer facing financial ruin, no hardship will be worked on them by making the opinion herein operate retroactively. It is to be remembered that the District Court of Oklahoma County sustained Oklahoma's right to tax in January, 1945, and that the opinion here in practical operation affirms the decision of that court.

The respondent cites *Yarbrough v. Oklahoma Tax Commission*, 193 Pac. (2d) 1017, 344 U.S. 717, as here supporting its contention. In that case the Supreme Court of Oklahoma held that an Oklahoma estate tax could be imposed on the estates of restricted Osage Indians. The decision was contrary to the decision in *Childers v. Pope*, 119

Okla. 300, which decision was expressly overruled. The Oklahoma Supreme Court was of the opinion that the *Mountain Producers case*; *Oklahoma Tax Commission v. U. S.*, 319 U.S. 598, and certain other cases handed down by this Court required a departure from the rule of law announced in *Childers v. Pope*. In the *Yarbrough case*, as here, taxes had been assessed, paid under protest and placed in suspense. The Supreme Court of Oklahoma did not require a refunding of the tax assessed nor did this Court on appeal. The Oklahoma Supreme Court merely held that the opinion should not be permitted to operate in such a manner as to upset titles that had vested in reliance upon *Childers v. Pope*. The reason for not making the opinion fully retroactive was that it was a matter of common knowledge that many Osage estates had been closed and the properties thereof had passed into the hands of third persons who had relied upon *Childers v. Pope* and that the opinion should not operate so as to destroy such titles. The foregoing statement is amply supported by the following quotation taken from the body of the opinion:

"* * * Upon that point, we observe that the rule of our former decision, following *Childers v. Beaver*, was established in 1926, and under that rule of non-liability of such estates to the tax here involved, it is a matter of common knowledge, as well as judicial knowledge that many estates have been administered upon and closed and titles vested with no thought that any such tax liability existed and without any demands for or effort to collect such a tax; and that the stability of titles might be grievously affected unless we set at rest, or permit to remain at rest, any question as to the liability of any such estates for any such tax. It is suggested on the part of the Tax Commission that no

intention exists to undertake to surmount the apparent difficulties and to seek to apply this rule of taxability to such estates heretofore closed. We fully agree with the thought that no such effort should be made and to that end, and for the reasons stated, we deem it our duty, and clearly within our authority, to give the aforesaid prospective effect only to this change in such rule. See *Oklahoma County v. Queen City Lodge No. 197, I. O. O. F.*, 195 Okla. 131, 156 Pac. (2d) 340, and the many authorities therein cited.

We wish to point out that the Oklahoma Tax Commission acquiesced in not making the opinion in the *Yarbrough* and *West* cases fully retroactive. In the instant case, and as before pointed out, the Oklahoma Tax Commission long ago agreed that no tax here involved should be assessed prior to the date the *Mountain Producers* case was handed down. We believe that it is significant that the respondent here has not undertaken to show where it or lessees similarly situated will suffer a hardship beyond that suffered by the estates in *Yarbrough* and *West* and they haven't so shown because it is impossible to so show.

The respondent has wholly failed to cite any authorities holding that the operation of an opinion will be made prospective under factual situations comparable with the one here presented. We are unable to find any authorities that hold that the matter of permitting taxing officials to retain taxes paid under protest, works such a hardship on a taxpayer as to justify a court in making an opinion prospective in operation. We again say that the respondent is here attempting to obtain from this Court a judgment re-

quiring the refunding of taxes paid which action on its part is to say the least, without precedent.

CONCLUSION

We respectfully submit that the Petition for Rehearing should be denied.

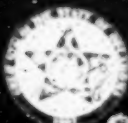
Respectfully submitted,

R. F. BARRY,
Oklahoma City, Oklahoma,
Attorney for Petitioner.

APRIL, 1949.

J. B. CARMICHAEL, CHAIRMAN
JOE D. DUNN, VICE-CHAIRMAN
HUBERT L. SOLEN, MEMBER

L. E. RUBLE, SECRETARY



OKLAHOMA TAX COMMISSION

STATE OF OKLAHOMA

OKLAHOMA CITY

Gross Production
DIVISION

March 15, 1938

The Texas Company
Box 1130
Tulsa, Oklahoma

IN RE: GROSS PRODUCTION TAX AND
PRORATION TAX ON PRODUCING
PROPERTIES OF LESSEES OF
WILD TRIBE INDIAN LANDS.

Gentlemen:

You are hereby notified that the Gross Production Division of the Oklahoma Tax Commission will collect unpaid gross production and proration taxes on the producing properties of lessees of Wild Tribe Indian lands on and after March 7th, 1938, and each delinquent taxpayer is hereby requested to remit his unpaid taxes with penalties.

A statement of a proposed assessment with detailed computation of the tax and penalty from available information will be sent within a reasonable length of time to each taxpayer so failing to remit.

Yours very truly,

OKLAHOMA TAX COMMISSION

By

J. B. Carmichael
CHAIRMAN

LB:md

Comm 2
OKC

September 29, 1939

Gross Production

The Texas Company
Box 2420
Tulsa, Oklahoma

IN RE: GROSS PRODUCTION TAX OF 7/8 OF
TAKING INTEREST IN OIL & GAS
PRODUCED FROM WILD TREES
RESTRICTED INDIAN LANDS

Gentlemen:

In accordance with an opinion from our legal department,
from which we quote as follows:

"The lessee's interest in oil pro-
duced from restricted Indian lands
is subject to the payment of the
gross production tax, as well as the
1/8 of 1¢ per barrel proration tax."

You are requested, as a purchaser of crude oil and/or gas,
to deduct the gross production tax and the 1/8 of 1¢ per
barrel proration tax before making settlement with the
producer and remit the tax to the Oklahoma Tax Commission
at the same time and in the same manner as the gross produc-
tion tax is paid on oil and gas produced from unrestricted
lands, effective as of September 1, 1939, which would apply
to September runs.

Thanking you for your compliance and cooperation in this matter,
we are

Yours very truly,

OKLAHOMA TAX COMMISSION

By

Chairman

wsp/jf

Comm 1
etc